STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 10, 2011

In the Matter of AJH, II, Minor.

No. 300696
Wayne Circuit Court
Family Division
LC No. 10-000281-AY

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child, AJH, under the stepparent adoption statute, MCL 710.51(6). The order also allowed petitioner-stepfather, who is married to AJH's mother, to adopt AJH. We affirm.

Respondent argues that the trial court erred when it terminated his parental rights and granted the stepfather's petition for adoption. We disagree. A trial court's factual findings are reviewed for clear error. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

A petitioner in a stepparent adoption proceeding must prove by clear and convincing evidence that termination of the noncustodial parent's parental rights is warranted. *In re Hill*, 221 Mich App at 691. MCL 710.51(6) provides:

> If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Thus, in order to terminate parental rights under MCL 710.51(6), the trial court must determine that both subsection (a) and subsection (b) have been satisfied. *In re Hill*, 221 Mich App at 692.

Both subsection (a) and subsection (b) contain a two-year period, which commences on the filing date of the petition and extends backward from that date for a period of two years or more. *Id.* at 689. Since the petition in this case was filed on June 4, 2010, the two-year period extended from June 4, 2010, back to June 4, 2008.

"[T]he first clause of subsection 6(a) applies where there is no support order and the second clause applies when there is an existing order." *In re Newton*, 238 Mich App 486, 493; 606 NW2d 34 (1999). Here, there is no support order, so only the first phrase of subsection (a) applies. Thus, the sole question concerning subsection (a) is whether respondent had the ability to support or assist AJH yet failed or neglected to do so for at least two years leading up to the filing of the petition. It is undisputed that respondent failed to provide any support for AJH for at least two years leading up to the filing of the petition. Respondent thought that he last made any support payments in 2007, and petitioner-mother testified that the last payment occurred in March 2006. It is clear that both dates are before June 4, 2008, and fall outside the two-year window. Also, respondent's reliance on making support payments before 2007 is not pertinent since the statute clearly sets the relevant time as the two years immediately preceding the filing of the petition.

But for subsection (a) to be satisfied, it must also be established that the noncustodial parent had the ability to provide support. Here, respondent testified that he worked as a substitute teacher and as a server/bartender at a restaurant. While his yearly income varied because of the unpredictability of work in both of his jobs, the evidence established that he made between $20,000 and $23,000 a year. In fact, respondent made $20,000 in 2009. The trial court found, by clear and convincing evidence, that the subsection (a) requirement was met because respondent had the ability to provide some support yet failed to do so. Given that it is undisputed that respondent provided no support from June 4, 2008, through June 4, 2010, and that he earned approximately $20,000 a year, we cannot conclude that the trial court's finding was clearly erroneous.

We also note that the claim respondent makes in his brief on appeal, namely that "the trial court . . . assert[ed] that a formal order for child support was necessary," is completely unfounded. The trial court never stated anything of the sort. In fact, the trial court correctly noted that "[i]n this case, there was no child support order in place. Therefore, the [c]ourt will examine whether [respondent] had the ability, yet failed to provide, regular and substantial support for [AJH]." We perceive no error in this regard.

Subsection (b) requires the petitioner to prove that the noncustodial parent had the ability to visit, contact, or communicate with the child, yet failed to do so regularly and substantially during the two-year window. *In re ALZ*, 247 Mich App 264, 273; 636 NW2d 284 (2001). Again, it is undisputed that respondent had virtually no contact with AJH during the two-year

window. Respondent testified that the last time he saw or spoke with AJH was in early 2007. During this two-year period, respondent did send two cards or letters to AJH, which were dated July 2008 and September 2008. However, sending two sporadic cards during a two-year period does not constitute regular and substantial communication. *In re Caldwell*, 228 Mich App 116, 121-122; 576 NW2d 724 (1998); *In re Martyn*, 161 Mich App 474, 482; 411 NW2d 743 (1987). Instead, respondent argues that he lacked the ability to visit or communicate with AJH.

Respondent claims that he was unable to have any contact with AJH because petitioner-mother prevented any attempts at visitation. Respondent's reliance on *In re ALZ* in support of this argument is misplaced. In *In re ALZ*, 247 Mich App at 273, the Court determined that, while there was no substantial contact between the noncustodial parent and the child during the two-year window, subsection (b) was nevertheless not satisfied because the noncustodial parent lacked "the ability to visit, contact, or communicate" with the child. There were two factors supporting this finding. First, the noncustodial parent's paternity had not been established until halfway into the two-year window; thus, the noncustodial parent did not have a legal right to visit or communicate with the child until the paternity had been established. *Id.* at 268, 273. Second, the custodial parent took affirmative steps to prevent the noncustodial parent from contacting the child, such as refusing any visitation requests, *id.* at 267, 274, and moving her wedding date up four months to expedite the stepparent adoption process in order to prevent the noncustodial parent from having any contact with the child, *id.* at 268 n 2.

Neither of these factors is present in the instant case. Respondent's paternity was established from the beginning when he signed AJH's birth certificate and an acknowledgement of parentage. Additionally, petitioners never prevented respondent from communicating with AJH or visiting. Respondent admitted that he stopped requesting visitation because of the growing difficulties with scheduling.[1] Moreover, he "gave up" on trying to see AJH because he felt "defeated," "tired," and "frustrated." Respondent's attempt to characterize petitioner-mother's acts of not providing a telephone number and not providing an address as being equivalent to the actions of the custodial parent in *In re ALZ* is without merit. Failing to provide such information can hardly be considered "affirmative" acts. And more importantly, respondent already had the means of communicating with petitioner-mother, regardless of whether she provided her phone number and address.[2] The regular way that respondent and petitioner-mother communicated was through e-mail, and respondent already knew of her e-mail address. As a result, the facts of this case are quite distinguishable from the facts in *In re ALZ*. The trial court's finding that respondent had the ability to visit and communicate with AJH was not clearly erroneous.

[1] These "difficulties" did not involve petitioners refusing to allow visitation. Instead, the difficulties seem to have involved (1) late or no responses to e-mails, (2) one side or the other cancelling prearranged visits, and (3) the amount of effort needed to coordinate "schedules [that] didn't always mesh."

[2] We note that respondent did discover petitioner's home address, even though petitioners did not provide it to him.

Respondent asserts in his brief on appeal that the trial court erred when it found that he did not regularly visit or contact AJH before 2007. First, this finding is not altogether pertinent because it involves activity outside the statutorily prescribed two-year window.[3] Second, based on respondent's own testimony, the finding was not clearly erroneous. Respondent characterized his visits as being "sporadic," initially occurring approximately three or four times a month and decreasing to possibly 15 times a year before ceasing altogether. Thus, the court's finding that respondent did not "regularly" contact or visit AJH before 2007 will not be disturbed.

In sum, there was clear and convincing evidence that respondent failed to support AJH for at least two years leading up to the filing of the adoption petition, even though he had the ability to do so, and that respondent failed to communicate or have contact with AJH for the same two-year period, even though he had the ability to do so. Thus, the trial court did not err when it terminated respondent's parental rights and granted the adoption petition under MCL 710.51(6).

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

[3] The trial court merely referenced this fact when it evaluated the best interests of AJH. We note that the trial court performed this best-interests analysis under the Juvenile Code; however, because the termination of parental rights was under MCL 710.51(6) of the Adoption Code, the Juvenile Code is not applicable. See *In re Jones*, 286 Mich App 126, 127-128; 777 NW2d 728 (2009). Regardless, even though MCL 710.51(6) does not *require* a distinct best-interests evaluation, the court was within its right to do so because "a court *may* consider the best interests of the child in deciding whether to grant a petition [under MCL 710.51(6)]." *In re Newton*, 238 Mich App at 494 (emphasis added).